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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-491

ALTON & SOUTHERN RAILWAY COMPANY, ET AL.,
Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

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In our view, the Brief in Opposition reinforces, rather than refutes, the reasons why the petition should be granted. Respondent does not deny that this case involves important issues of federal law, apart from urging that those issues have been correctly decided by the courts below (see Br. Op., at 9-10). And, as we shall briefly demonstrate, its arguments in that regard indicate at most that those issues are debatable, and thus appropriate for resolution by this Court in this case.

1. Respondent first contends that the "economic self interest" test, enunciated by the Fifth Circuit in the *Atlantic Coast Line* case and adopted by the courts below for determining the applicability of the Norris-LaGuardia Act, is "entirely consistent with express statements of this Court as to the reach of the Clayton and Norris-LaGuardia Act" (Br. Op., at 11; generally, at 9-13). However, the facts and issues in the cases cited by respondent are far removed from those involved in this case, and none of those decisions either adopt or approve the "economic self interest" test.[1] All of those decisions preceded the Fifth Circuit's *Atlantic Coast Line* decision, and it still remains true—as the Fifth Circuit conceded in that decision—that there is no "direct Supreme Court authority" for the "economic self interest" test. 362 F.2d, at 654.

We believe that the inadequacy of the "economic self interest" test is apparent from decisions by this Court such as *Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437 (1948), and *Columbia River Co.* v. *Hinton*, 315 U.S. 143 (1942), in which this Court held that a "labor dispute" within the Norris-LaGuardia Act was not involved in situations where the union's activities undoubtedly were prompted by "economic self interest." And see, generally, the dissent by Judge Choate in *Atlantic Coast Line*, 362 F.2d, at 655-660. Moreover, there is a line of decisions in the lower courts holding that a dispute over an issue which is not mandatorily bargainable under the Railway Labor Act is not a "labor dispute" for purposes of the Norris-LaGuardia Act. *E.g.*, *Lakefront D. & R.T. Co.* v. *International Longshoremen's Ass'n*, 333 F.2d 549, 553 (6th Cir., 1963); *Chicago & North Western*

[1] For example, *United States* v. *Hutcheson*, 312 U.S. 219 (1941), upon which respondent principally relies, involved issues as to whether "the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs is a violation of" Section 1 of the Sherman Antitrust Act. *Id.*, at 227.

Ry. Co. v. *Order of Rail. Tel.*, 264 F.2d 254, 258, 260 (7th Cir., 1959), rev'd on other grounds, 362 U.S. 330 (1960); *Brotherhood of Rail. Train.* v. *New York Central R. Co.*, 246 F.2d 114, 118 (6th Cir., 1957), cert. den., 355 U.S. 877 (1957). We noted in our petition (p. 15) that, as respondent conceded below, petitioners' participation in the strike insurance program is not a mandatorily bargainable issue under the Railway Labor Act, and respondent does not make any contention or suggestion to the contrary in its brief in opposition.

For present purposes, however, the decisive factor is not how these issues should be resolved, but that they continue to be at least as open and as important as they were when this Court granted certiorari in the *Atlantic Coast Line* case. Since this Court's even division prevented a definitive resolution by this Court in that case, the Court should now grant this petition particularly since, as we have shown (Pet., at 8-11), the decision below in this case permits strikes and picketing that are much more extensive than was involved in *Atlantic Coast Line* and threatens the utility of petitioners' strike insurance program.[2]

2. Respondent does not even attempt to defend on the merits the refusal of the courts below, following the lead of the Fifth Circuit in *Atlantic Coast Line*, to accommodate the Norris-LaGuardia Act with the Railway Labor Act (see Pet., at 13; generally, at 11-17). Rather, respondent contends (Br. Op., at 13-16) that the decisions below are "consistent" with such an accommoda-

[2] Respondent's suggestion that "many of the issues in the *Atlantic Coast Line* case were resolved in the *Jacksonville Terminal* case" (Br. Op., at 13 n. 3) ignores the fact that *Jacksonville Terminal* did not involve the Norris-LaGuardia Act (having arisen in a State court, while Norris-LaGuardia is limited to the jurisdiction of the Federal courts), and thus did not resolve any issues as to the application of that statute.

tion because, under this Court's *Jacksonville Terminal* decision, "the right to self-help under the Railway Labor Act is not limited to a direct employer-employee relation as petitioners would have it" (Br. Op., at 14).

The courts below did not purport to rely upon *Jacksonville Terminal*, and Judge Robinson expressed the view that *Jacksonville Terminal* does not support strikes and picketing by respondent of petitioners (see Pet., at 17). As we have noted (Pet., at 16-17), *Jacksonville Terminal* was limited to secondary picketing by employees of one railroad, in connection with a major dispute as to which the procedures of the Railway Labor Act had been exhausted in bargaining between that railroad and the union representing the employees in question, of a joint terminal or "common situs" which that railroad owned in common with three other railroads and which constituted an integral part of the operations of the railroad with which the major dispute existed. Here, respondent not only threatened but, after the petition was filed, actually engaged in strikes and picketing of most of the nation's railroads (see Br. Opp., at 9) by their own employees represented by respondent, which strikes and picketing were not limited to a "common situs" or otherwise.

Plainly, *Jacksonville Terminal* did not hold that a union can thus institute a national railroad strike over a dispute with a single railroad, as such a situation was not involved. And, respondent's contention that the principles expressed by the majority in that 4-3 decision should be stretched to countenance such drastic action to the detriment of the public as well as to petitioners emphasizes the importance of review by this Court. It is difficult to conceive a result more "fundamentally at odds with the [Railway Labor] Act's primary objective—the prevention of strikes." *Shore Line* v. *Transportation Union*, 396 U.S. 142, 154 (1969).

Respondent asserts (Br. Op., at 16) that "petitioners fail to recognize . . . that the right to self-help in this case arises solely from the BRAC-N&W dispute, and by aligning themselves with the N&W in that dispute, petitioners have in effect become parties to that dispute and self-help is, thus, justly available against them." Even apart from the fact that respondent's interpretation of *Jacksonville Terminal* is not dependent upon any such alignment, and that respondent's strikes and picketing in fact were not limited to the railroads participating in the strike insurance program, this assertion by respondent ignores the fact that petitioners are not actual parties to the BRAC-N&W dispute, that they were not served with the Section 6 notices that gave rise to the dispute and have not participated in the negotiations, mediation or emergency-board proceedings, and thus that petitioners have no voice in settling the dispute. A contention that petitioners can be struck and picketed by respondent in such circumstances surely is an issue which this Court should review and decide.

3. Finally, respondent suggests (Br. Op., at 16-18) that denial of the petition for writ of certiorari is warranted because the judgment below is interlocutory in that it involves denial of a preliminary injunction. However, that is not in itself sufficient reason for denying a petition, as the authorities which respondent cites demonstrate. Thus, in *Estelle* v. *Gamble*, 429 U.S. 97 (1976), this Court did in fact review an interlocutory judgment, and Stern and Gressman note that where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Stern and Gressman, *Supreme Court Practice* (5th ed.), at 301.

We believe that we have demonstrated that this case involves important and "clear-cut" issues of law which

should be reviewed and decided by this Court. While respondent suggests (Br. Op., at 17) that its dispute with the N&W may be settled as a result of the emergency board proceedings now underway, it also asserts that its "right to employ self-help revives at the end of" the status-quo period under Section 10 of the Railway Labor Act "unless an agreement is reached or is imposed by Congress." Respondent does not disavow an intention, if that should occur, of resuming strikes and picketing of petitioners. Thus, if the decision by the courts below in this case are left standing, petitioners may once again be subjected to strikes and picketing over a dispute in which they are not involved. Moreover, that decision would stand as a precedent justifying similar national strikes and picketing in future disputes between a union and a single railroad, even if the present BRAC-N&W dispute should be settled. In these circumstances, the decision denying a preliminary injunction should be reviewed and reversed by this Court.

For the reasons stated above and in the petition for writ of certiorari, that petition should be granted.

Respectfully submitted,

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